

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DENNIS K. SADBERRY,

Petitioner,

vs.

JACK PALMER, et al.,

Respondents.

3: 10-cv-0498-ECR-RAM

ORDER

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which petitioner, a state prisoner, is proceeding *pro se*. On November 10, 2010, petitioner filed an application to proceed *in forma pauperis* in this action. (Docket #5.) However, on November 15, 2010, petitioner paid the \$5.00 filing fee. (Docket #6.) Accordingly, petitioner's application to proceed *in forma pauperis* will be denied as moot.

A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

1 A habeas petitioner must “present the state courts with the same claim he urges upon the
2 federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional implications
3 of a claim, not just issues of state law, must have been raised in the state court to achieve exhaustion.
4 *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To
5 achieve exhaustion, the state court must be “alerted to the fact that the prisoner [is] asserting claims
6 under the United States Constitution” and given the opportunity to correct alleged violations of the
7 prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v. Wood*, 195 F.3d
8 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple and clear
9 instruction to potential litigants: before you bring any claims to federal court, be sure that you first
10 have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose*
11 *v. Lundy*, 455 U.S. 509, 520 (1982)).

12 A claim is not exhausted unless the petitioner has presented to the state court the same
13 operative facts and legal theory upon which his federal habeas claim is based. *Bland v. California*
14 *Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion requirement is not met
15 when the petitioner presents to the federal court facts or evidence which place the claim in a
16 significantly different posture than it was in the state courts, or where different facts are presented at
17 the federal level to support the same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir.
18 1988); *Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F.
19 Supp. 455, 458 (D. Nev. 1984).

20 In the instant case, petitioner expressly states that the claims he seeks to raise in this court
21 remain pending before the Nevada Supreme Court. Because petitioner’s state proceedings
22 challenging his conviction remain pending before the state court, his federal habeas petition is
23 premature and the claims therein remain unexhausted. The federal petition will be dismissed
24 without prejudice.

25 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28
26 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951

1 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
2 petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a
3 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
4 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court’s
5 assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In
6 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
7 debatable among jurists of reason; that a court could resolve the issues differently; or that the
8 questions are adequate to deserve encouragement to proceed further. *Id.*

9 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section
10 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the
11 order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice
12 of appeal and request for certificate of appealability to be filed. Rule 11(a). This court has
13 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
14 issuance of a certificate of appealability, and determines that none meet that standard. The court will
15 therefore deny petitioner a certificate of appealability.

16 **IT IS THEREFORE ORDERED** that petitioner’s application to proceed *in forma pauperis*
17 is **DENIED** as moot. (Docket #5.)

18 **IT IS FURTHER ORDERED** that this action is **DISMISSED WITHOUT PREJUDICE**.
19 The clerk shall enter judgment accordingly.

20 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

21
22 DATED this 17th day of November, 2010.

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24 UNITED STATES DISTRICT JUDGE
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